No. 79-207

Supreme Court, U.S.
FILED
OCT 30 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

DOUGLAS W. ALBERT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B15) is reported at 595 F. 2d 283.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1979. A petition for rehearing was denied on July 2, 1979 (Pet. App. F1). The petition for a writ of certiorari was filed on August 8, 1979, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]On September 11, 1979, Mr. Justice Powell denied petitioners' belated application for an extension of time within which to file a petition for a writ of certiorari.

QUESTIONS PRESENTED

1. Whether the introduction into evidence of a prior similar crime by petitioner Gonzalez deprived petitioners of a fair trial.

2. Whether the evidence was sufficient to support the convictions of petitioners Davis and Garcia.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioners, former members of the Houston (Texas) Police Department, were convicted of conspiring to violate the civil rights of suspects in custody, in violation of 18 U.S.C. 241 (count one). Petitioners Albert, Jackson, Gonzalez and Smith were also convicted on two counts of willfully depriving persons of their rights under color of law, in violation of 18 U.S.C. 242 (counts three and four).[2] In addition, petitioners Albert, Gonzalez, and Smith were each convicted on one count of filing false income tax returns, in violation of 26 U.S.C. 7206(1) (counts five, six, and seven, respectively). Petitioners Albert, Jackson, Gonzalez, and Smith were sentenced to consecutive terms of five years' imprisonment on count one and one year's imprisonment on each of the substantive counts on which they were convicted. Petitioners Davis and Garcia were sentenced to three years' imprisonment on count one. The court of appeals affirmed (Pet. App. B1-B15).

The evidence at trial showed that in the spring and summer of 1972, petitioners, along with other members of the Narcotics Division of the Houston Police Depart-

[2]Petitioners Davis and Garcia were acquitted on counts three and four. Davis was also acquitted on count eight, which charged him with filing false income tax returns.

ment,[3] participated in placing and monitoring unlawful wiretaps on telephone lines to gain information about drug trafficking in Houston. As a result of these wiretaps, petitioners learned in July 1972 that Geronimo Torres planned to sell a quantity of marijuana to Charles Jacobs, a buyer from Michigan. At approximately 6:00 p.m. on July 25, 1972, Torres delivered the marijuana to Jacobs at a Houston motel. Jacobs gave $900 to Torres in exchange for the marijuana[4] and $300 to John Huston, who had come to Houston with Jacobs to drive the load of marijuana back to Michigan (Tr. 49-53, 60, 64, 190, 277, 279, 291-292, 300-302, 333, 335, 339, 461-462, 505-507, 517-518).

After Huston left the motel with the marijuana, petitioners Jackson and Avila knocked on the door of the motel room, identified themselves as police officers, and demanded entry. Petitioner Albert arrived shortly thereafter.[5] The officers beat Torres and Jacobs. Avila took the $900 that Torres had received from Jacobs while petitioner Jackson seized almost $9,000 from Jacobs. Other Houston Police officers beat Huston and seized the $300 that he had received from Jacobs. The money was never returned to Torres, Jacobs, or Huston, nor was it listed on the property receipts those men received when

[3]The other officers were Carlos Avila, Antonio Zavala, and Michael Chavez. Chavez had previously pleaded guilty to perjury and was not charged in this case. Avila and Zavala were named in the indictment with petitioners, but prior to trial they pleaded guilty to a separate information charging unlawful interception of wire communications. All three testified against petitioners at trial.

[4]Jacobs had previously given Torres a $3000 downpayment on the marijuana (Tr. 47).

[5]Other unidentified officers may also have been present during the succeeding events (Pet. App. B3 n.3).

they were arrested. Instead, petitioners Albert, Jackson, Gonzalez, Davis and others prepared a list of the stolen money and the officers involved and then distributed the money to the various participants, including petitioners Davis and Garcia (Tr. 62-70, 165, 294-296, 377, 407-409, 475, 539, 578, 627-628, 646-648; Gov't Exhs. 7, 12).

In addition, Chavez testified to a similar unlawful scheme involving illegal wiretaps that had occurred between two and three years prior to the events that form the basis for this prosecution. The exploitation of those wiretaps led to the seizure of a pound of heroin from a suspect. Co-defendant Zavala and another officer brought the heroin to Chavez, who in turn sold it to an informer for $8,000. Chavez then "sliced the pie" with Zavala, petitioner Gonzalez, and the other officer, giving each participant $2,000 (Pet. App. B8).

ARGUMENT

1. Petitioners contend (Pet. 9-13) that the trial court incorrectly permitted Chavez to testify regarding petitioner Gonzalez's prior criminal act. Although other crimes evidence is "not admissible to prove [bad] character," it is admissible for any other relevant purpose including "proof of * * * intent, preparation, plan, * * * [or] identity * * *." Fed. R. Evid. 404(b); see, *e.g.*, *Andresen* v. *Maryland*, 427 U.S. 463, 483-484 (1976); *United States* v. *Benedetto*, 571 F. 2d 1246, 1248 (2d Cir. 1978). Here, as the court of appeals observed, both the challenged prior act and the primary offense charged involved exploitation of illegal wiretaps, a conspiracy among Houston policemen to deprive drug suspects of their rights and property without due process of law, and a distribution of the ill-gotten gains among the various officers (Pet. App. B10). In such circumstances, the similar act evidence was admissible under Rule 404(b) to

demonstrate Gonzalez's participation in a distinctive scheme or plan. See, *e.g.*, *United States* v. *Weidman*, 572 F. 2d 1199, 1201-1203 (7th Cir. 1978); *United States* v. *Weaver*, 565 F. 2d 129, 134 (8th Cir. 1977) ("modus operandi"); *United States* v. *Scholle*, 553 F. 2d 1109, 1120-1121 (8th Cir. 1977); *United States* v. *Fearns*, 501 F. 2d 486, 491 (7th Cir. 1974); *United States* v. *Jones*, 476 F.2d 533, 536 (D.C. Cir. 1973); *McCormick on Evidence* para. 190, at 448-449 (2d ed. 1972); 2 *Weinstein's Evidence* para. 404[09], at 404-57 to 404-66 (1979).

Moreover, Chavez's testimony was also admissible to demonstrate Gonzalez's intentional interference with drug suspects' constitutional rights. See, *e.g.*, *United States* v. *Williams*, 577 F.2d 188, 191 (2d Cir.), cert. denied, 439 U.S. 868 (1978); *United States* v. *Weidman*, *supra*, 572 F.2d at 1202; *United States* v. *Adcock*, 558 F.2d 397, 401-402 (8th Cir.), cert. denied, 434 U.S. 921 (1977); *United States* v. *Scholle*, *supra*. Petitioners suggest (Pet. 9, 12) that although intent is an element of both 18 U.S.C. 241 and 242, the issue of intent was not really contested. However, petitioners "did not affirmatively take the issue of intent out of the case." *United States* v. *Williams*, *supra*, 577 F.2d at 191; see *United States* v. *Weidman*, *supra*, 572 F.2d at 1202. Accordingly, the government was entitled to introduce highly probative evidence regarding Gonzalez's knowledge of and intentional participation in a scheme to deprive persons of their civil rights, particularly since both Sections 241 and 242 are specific intent crimes. See *United States* v. *Guest*, 383 U.S. 745, 753-754 (1966); *Screws* v. *United States*, 325 U.S. 91, 103 (1945). See also *United States* v. *Weidman*, *supra*.[6]

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[6]There is thus no conflict between this case and *United States* v. *Ring*, 513 F.2d 1001 (6th Cir. 1975). In *Ring* the court concluded that the other crimes evidence was not admissible to show intent in that case because intent was not contested. The Sixth Circuit observed,

Nor is there any merit to petitioners' claim that the prejudicial effect of the other crimes evidence substantially outweighed its probative value. See Fed. R. Evid. 403. As petitioners recognize (Pet. 10), the trial judge has broad discretion in admitting probative other crimes evidence. See *United States* v. *Williams*, *supra*, 577 F. 2d at 193; *United States* v. *Weaver*, 565 F.2d 129, 134 (8th Cir. 1977); *United States* v. *Fairchild*, 526 F.2d 185, 189 (7th Cir. 1975), cert. denied, 425 U.S. 942 (1976). Petitioners nonetheless suggest that Chavez's testimony lacked probative value because an indictment based on the occurrences constituting the similar act evidence had previously been dismissed. That dismissal, however, was unrelated to Gonzalez's guilt or innocence (Pet. App. E1),[7] and the admissibility of other crimes evidence does not depend on the existence of a conviction. See, *e.g.*, *Smith* v. *Wainwright*, 568 F.2d 662 (5th Cir. 1978) (acquittal); *United States* v. *Juarez*, 561 F.2d 65, 70 (7th Cir. 1977) (dismissal of indictment); *United States* v. *Rocha*, 553 F.2d 615 (9th Cir. 1977) (acquittal); *United States* v. *Jones*, *supra*, 476 F.2d at 537 n.3. The court of appeals correctly found that "[t]he probative value of the

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however, that certain crimes by their nature always present the issue of intent. *Id.* at 1007-1008. Specific intent crimes fall into that category. In any event, the evidence at issue here was admissible to demonstrate a distinctive plan or scheme as well as intent.

[7]The indictment, which was based on Chavez's information, alleged that the money had been divided in Van's Ballroom in October 1969. Subsequently, Zavala began to cooperate with the authorities and he stated that the division of proceeds had occurred in February or March 1969. Zavala proved to be correct, as the government later discovered that Van's had burned down in August 1969. The district court thereafter dismissed the indictment as time barred (Pet. App. E1). Thus, contrary to petitioners' intimations, the dismissal related to *when*, rather than *whether*, the offense occurred.

extrinsic offense evidence was strong because of the high degree of similarity between the two occurrences" (Pet. App. B9-B10).[8]

Finally, petitioners argue (Pet. 10-11) that the district court erred in failing to instruct the jurors concerning the limited admissibility of the other crimes evidence. Petitioners assert that the court should have informed the jurors that such evidence was admissible as to Gonzalez only and solely with regard to the question of intent.[9] But petitioners failed to request such instructions at the time that Chavez's testimony was admitted, see Fed. R. Evid. 105,[10] and the trial court's failure to instruct the jury *sua sponte* was not plain error (Pet. App. B11). See, *e.g.*, *United States* v. *Conley*, 523 F.2d 650, 654 n. 7 (8th Cir.

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[8]Petitioners also erroneously claim (Pet. 7) that the court of appeals' application of the *en banc* decision in *United Stares* v. *Beechum*, 582 F.2d 898 (5th Cir. 1978), cert. denied, No. 78-5774 (Feb. 21, 1979), "falls within the gambit [sic] of *Ex Post Facto* prohibition" (Pet. 7). In *Beechum*, the Fifth Circuit interpreted Fed. R. Evid. 404(b) as abrogating a prior decision regarding the standard for determining whether a similar act sufficiently demonstrates the defendant's involvement in the prior crime. A change in the rules governing the admissibility of particular kinds of evidence, rather than the quantum of evidence required to convict, is not an ex post facto law, because it is not a law "which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available acording to law at the time when the act was committed * * *." *Beazell* v. *Ohio*, 269 U.S. 167, 169 (1925).

[9]In fact, the evidence was also relevant to show a distinctive plan or scheme involving Gonzalez. See page 5, *supra*.

[10]Rule 105 provides (emphasis supplied):

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly.

1975), cert. denied, 424 U.S. 920 (1976); *United States* v. *Bozza*, 365 F.2d 206, 214 (2d Cir. 1966). Moreover, although the district court correctly rejected petitioners' belated request to charge the jury on this issue "because it was internally inconsistent and misleading" (Pet. App. B10),[11] the court did tell the jurors to give individual consideration to the evidence against each defendant (Pet. App. B11).

2. Petitioners Davis and Garcia contend (Pet. 13-16) that there was insufficient evidence to support their conspiracy convictions. Avila and Chavez testified, however, that Davis and Garcia were involved in the illegal monitoring of telephone calls and the surveillance of the various participants in the Torres drug transaction (Tr. 291-292, 379, 460-462, 470-471, 505-507, 517-518). Moreover, at least Davis (and possibly Garcia) attended a meeting to discuss the division of the stolen money, and both Davis and Garcia received a share of that money (Tr. 295, 377, 408-409, 475, 578). In short, there was substantial evidence of Davis's and Garcia's knowing and

[11]Several days after Chavez testified, petitioners asked the court to instruct the jury "not to concern [itself] with the question of whether or not * * * Gonzalez participated in said criminal offense or is anyway guilty of the alleged sale of heroin in 1969" (Pet. App. B10). But, as the court of appeals stated, "Gonzalez's participation in the 1969 offense was the whole point of the collateral offense matter" (*ibid.*). In such circumstances, the district court properly refused the proposed instruction even if other portions of that requested charge were accurate. See *United States* v. *Lam Lek Chong*, 544 F.2d 58, 68 (2d Cir. 1976), cert. denied, 429 U.S. 1101 (1977); *United States* v. *Fellabaum*, 408 F.2d 220, 228 (7th Cir.), cert. denied, 396 U.S. 818 (1969).

purposeful participation in the conspiracy.[12] Further review of this fact-bound question is unwarranted. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1979

[12]Petitioners' argument that the court of appeals failed to apply the "substantial evidence" test adopted by the *en banc* court of appeals in *United States* v. *Malatesta*, 590 F.2d 1379 (5th Cir. 1979), cert. denied, Nos. 78-6478, 78-6487, 78-6509, 78-6511 and 78-6512 (Oct. 1, 1979), is without merit. Prior to *Malatesta*, which was decided while this case was on appeal, the Fifth Circuit applied the so-called "sight evidence test" in reviewing whether the evidence connected a particular defendant to an established conspiracy. See *United States* v. *Malatesta*, *supra*, 590 F.2d at 1381. Petitioners suggest that because the government's brief in the court of appeals relied on the slight evidence test, the court of appeals' dismissal of their sufficiency claim without discussion (Pet. App. B4) shows that the court of appeals applied the slight evidence test. Nothing in the record, however, suggests that the court of appeals did not apply the standards established in *Malatesta*, and in any event there is substantial evidence supporting petitioners' convictions.

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